

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
SUPPLEMENTAL
BRIEF**

74-2610

To be argued by
E. THOMAS BOYLE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

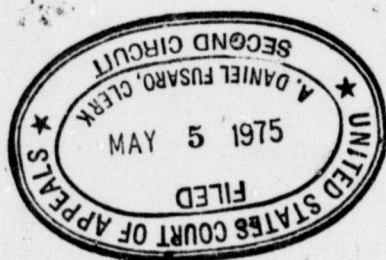
JAMES HENRY ROLLINS,
a/k/a LEE EVANS,

Appellant.

Docket No. 74-2610

SUPPLEMENTAL BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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Subsequent to the filing of appellant's brief on April 21, 1975, counsel became aware of an issue relating to the admissibility of Government Exhibit #10, which purports to be a copy of an official Post Office directory* published by the Government of Kenya. This document was admitted into evidence, over

*Appellant's main brief, at 9, incorrectly refers to this document as a "telephone" directory.

defense counsel's objection, although the Government failed to establish the dual requisites of authentication and certification required for the introduction of a copy of a foreign official document under Rule 44(a)(2), Fed.R.Civ.P.,* and Title 28, U.S.C., §1741.**

*This rule provides:

A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

Rule 27 of the Federal Rules of Criminal Procedure makes Rule 44 applicable in criminal cases.

**This provision, which incorporates Rule 44(a)(2) by reference, provides:

An official record or document of a foreign country may be evidenced by a copy, summary or excerpt authenticated as provided in the Federal Rules of Civil Procedure.

The record reflects that a copy of the Kenya postal directory (Government Exhibit #10) was admitted into evidence via the testimony of Mr. Giles Noronha, a Kenya resident employed by a Nairobi branch of the Standard Bank, Ltd., of England. Noronha testified that the directory was in common use in Kenya, where mail is delivered to one's Post Office box rather than to the home or business. He further stated that the directory was published by the Kenya postal authorities (137-143*).

The Government's sole authority for the introduction of this exhibit at the trial was Rule 803(17)** of the Federal Rules of Evidence (145), which become effective July 1, 1975. The defense properly objected*** to the introduction of this document. However, the objection was overruled and the document was admitted into evidence, apparently on the authority of the Federal Rules of Evidence (145).

*Numerals in parentheses refer to pages of the transcript of the trial below.

**The exceptions to the hearsay rule contained in Rule 803 do not provide for admission of evidence, but instead merely state that "the following are not excluded even though the declarant is available." Discussed in the text, infra, at 4-5, Rule 803(17) states:

Market reports, commercial publications. -- Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

***Defense counsel Panzer, assisting appellant in his pro se defense, objected on two grounds: (1) that Noronha was "not an authority of the Post Office," and (2) that the exhibit was a foreign document (144).

The introduction of Government Exhibit #10 and the testimony on which it was based was error. Since the postal directory was published by a foreign governmental agency, it constitutes an "official record." United States v. Aluminum Corporation of America, 1 F.R.D. 71 (S.D.N.Y. 1939); Moore's, FEDERAL PRACTICE, §44.02. Its admission is therefore governed by Fed.R.Civ.P. 44(a)(2). This section requires that a foreign document be (1) "attested by a person authorized to make attestation," and (2) accompanied by a "final certification as to the genuineness of the signature and official position of the attesting person." Rule 44(a)(2), Fed.R.Civ.P. Here, the Government satisfied neither of these prerequisites for admission, and the admission of this exhibit without compliance with Rule 44(a)(2), Fed.R.Civ.P., was error* mandating reversal. United States v. Ghaloub, 385 F.2d 567 (2d Cir. 1966); United States v. D'Agostino, 338 F.2d 490 (2d Cir. 1964); Gulden v. United States, 278 F.Supp. 1019 (N.D.N.Y. 1967); Moore's, FEDERAL PRACTICE, supra, §44.03.

It goes without saying that Rule 803(17) of the Federal Rules of Evidence, not yet in effect, is no authority for the introduction of evidence here. However, even if the Federal Rules of Evidence were in effect, the result would not change.

*Even if the Government were seeking to introduce postal books and records of the United States, such documents would have to be "properly authenticated" prior to their admission. 28 U.S.C. §1733.

Rule 803 does not provide for the admission of evidence, but instead merely provides that the enumerated exceptions "are not excluded by the hearsay rule, even though the declarant is available as a witness." The Advisory Committee's Notes point up the critical significance of this language:

The exceptions are phrased in terms of non-application of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.

FEDERAL RULES OF EVIDENCE,
Rule 803, Advisory Committee's Notes at 348.

Thus, here the exception contained in Rule 803(17) is not intended to eliminate the requirements of Rule 902(3) of the Federal Rules of Evidence, which provides that foreign public documents must be properly authenticated and certified before they can be admitted into evidence. This latter provision is simply a re-codification of the present law as reflected by Rule 44(a)(2) of the Federal Rules of Civil Procedure.

The introduction of the postal directory and the testimony based on that document were gravely prejudicial to appellant's case. Mr. Noronha testified that Post Office box number 48976, which was the number which appeared in appellant's address book opposite the name "Mr. Zini," was rented to one Walter Donald Obedo Ooko, a former employee of the Foreign Exchange Department of the Nairobi branch of the Standard Bank, Ltd., who had been discharged approximately a year earlier (147-148). This

testimony, coupled with that of Agent Slovinski -- that appellant, after his arrest, had instructed his wife to contact Zini and inform him what had happened -- provided a critical link in the chain of circumstantial evidence showing that appellant was a knowing participant in the scheme.

CONCLUSION

For the foregoing reasons and the reasons set forth in the main brief for appellant, the judgment of the District Court should be reversed and the case remanded for a new trial.

Respectfully submitted,

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Certificate of Service

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supplemental

I certify that a copy of this brief ~~supplemental~~ has been mailed to the United States Attorney for the Southern District of New York.

E. Thomas Boyle